In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 162

S. S. SILBERBLATT, INC., PETITIONER

v.

THE TAX COMMISSION OF THE STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's order of October 12, 1959, inviting the Solicitor General to set forth the views of the Federal Government as to the importance of the issues involved. We believe, for the reasons stated below, that the case presents substantial issues as to the nature and status, for local taxing purposes, of so-called Capehart Act mortgage corporations.

1. On August 11, 1955, Congress enacted the Capehart Act, 42 U.S.C. (1952 ed., Supp. V) 1594, an amendment to the National Housing legislation to authorize an extensive program of military housing of substantial importance to the defense requirements

of the nation.[1] Briefly, the Capehart Act provides a means of financing the construction of vitally needed housing facilities for military and civilian personnel through the medium of government guaranteed loans.[2] Under it, corporations, privately organized, are created for the sole purpose of leasing Government land and mortgaging the leasehold at an amount sufficient to finance the construction of military housing projects. These corporations, after acquisition of the leasehold, possess no assets of any value other than the proceeds of the mortgage which are to be paid over to the contractor; no methods are provided whereby profits may be realized by these corporations (rentals being payable directly to the United States); all their capital stock is endorsed in blank and deposited in escrow for delivery to the military department concerned; title to the improvements vests in the United States upon completion of construction; the leasehold estate has no earning capacity, the only value in the mortgage lying in the fact that it is insured by the Federal Housing Administration and its payment is undertaken by the military department concerned. Re-

[1] The Office of the Assistant Secretary of Defense has informed us that as of September 18, 1959, a total of 290 Capehart Act projects, totaling 109,212 housing units, had been approved by the Assistant Secretary of Defense.

[2] An appreciation of the purpose and significance of the Capehart Act military housing program is provided by the Senate Committee on Banking and Currency in S. Rep. No. 231, 85th Cong., 1st Sess. That report contains a complete review of military housing programs from the inception of the so-called Wherry Act (Title VIII of the National Housing Act, in effect prior to the enactment of the Housing Amendments of 1955) through the enactment of the Housing Act of 1956, c. 1029, 70 Stat. 1091.

demption of the mortgages is accomplished by the United States primarily through the use of current rentals and quarters allowances payable to military personnel. From their very inception the sole purpose of such corporations is to afford the military department concerned the opportunity of utilizing the provisions of the Capehart Act to finance the construction of military housing projects.

Corporations formed at the direction of the armed services, pursuant to the Capehart Act, serve no function of any substance except to enable the armed services of the United States to construct, acquire and pay for housing projects required for military personnel without utilizing current appropriations or Treasury loans. For these reasons, such corporations may properly be regarded as direct instrumentalities of the United States in performing its governmental function of providing military housing and, as such, partake of the immunity of the United States from state taxation to the same extent as other constituent parts of the Federal Government. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Clallam County* v. *United States*, 263 U.S. 341; *N.Y. ex rel. Rogers* v. *Graves*, 299 U.S. 401; cf. *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570. See also *Green* v. *Eglin AFI Housing, Inc.*, 104 So. 2d 463 (D.C. App., Fla.).

2. The Court of Appeals held that the New York mortgage recording tax[3] (Section 253 of the New

[3] Although the tax here will be borne by petitioner, and not the Federal Government, it is reasonable to assume that the decision below, if followed, would result in private builders increasing their bids in the future, and to that extent of increasing the ultimate costs to the Government.

York Tax Law, 59 McKinney's Consolidated Laws of New York) is not a tax on property, but a tax upon the privilege of recording a mortgage. This Court has held in cases involving similar tax statutes that, for Federal purposes, the tax is to be considered a tax upon the mortgage where it falls upon a corporation which is an agent or instrumentality of the United States. *Federal Land Bank* v. *Crosland*, 261 U.S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U.S. 21. The rationale of these decisions would appear to be equally applicable here, since the corporations—although privately organized—are instrumentalities of the Federal Government.[1]

Respectfully submitted.

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NOVEMBER 1959.

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[1] For similar reasons this case may also present an issue under Section 3701 of the Revised Statutes (31 U.S.C. (1952 ed.) 742) which exempts obligations of the United States from state or local taxation.

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